Supreme Court, U.S.
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In the Supreme Court of the United States

QUANG DIHN NGUYEN,

Petitioner,

Versus

JOHN ASHCROFT, Attorney General of the United States,

Respondent.

On Petition for Writ of Certiorari to The United States Court of Appeals For the Ninth Circuit

SUPPLEMENTAL APPENDIX

United States District Court
Western District of Washington
At Seattle

Quang Dihn Nguyen	)	
	)	No. C00-2079L
Petitioner,	)	
	)	REPORT AND
	)	RECOMMENDATION
	)	
Robert Coleman.,	)	
	)	
Respondents.	)	
	)	

I. Introduction

Petitioner Quang Dihn Nguyen challenges his final order of deportation from United States by the Immigration and Naturalization Services ('INS') under 28 U.S.C.& 2241. This petition presented issues involving the intricate analysis of over lapping amendments to the INA made by IIRIRA and by AEDPA. Briefing by counsel for both parties gave rise to much consternation and left the Court wanting for the analysis. As a result, Respondent's Motion to Dismiss (Dkt.#9) will be granted only in part. Having reviewed

Respondent's motion and the remainder of the record, I recommend that Respondent's Motion to Dismiss be: granted as to petitioner's claims of unlawful denial of withholding and retroactive application of AEDPA; denied as the petitioner's equal protection claim and Respondent's Motion to Dismiss for lack of jurisdiction; and, stricken as moot as the petitioner's due claim. The remaining claim to be briefed by the parties is Petitioner's claim that his ineligibility for INA §212(c) relief is a violation of the right to equal protection of the Law under the Due Process Clause of the Fifth Amendment.

II. Facts and Procedural History

Petitioner entered to United States as a Vietnamese refugee on October 19, 1984. (Dkt.#7at 206). He is a native citizen of Vietman. (Id.). He adjusted to Permanent Resident status on May 28, 1986. (Id. At 198, 711). On September 23, 1996, Petitioner entered a guilty plea and was convicted in state court of a Violation of the Controlled Substance Act ("VUCSA") for delivered of a Controlled Substance,

cocaine. (Dkt.#3, Exh.B). He was sentenced to 26 months. As a result of his aggravated felony conviction, the INS initiated deportation proceedings on September 27, 1996. (Id., Exh.B. A). Petitioner completed his date court sentence, and on July 23, 1997, he was transferred to a custody of the INS. In August 1997 Petitioner was released from INS custody on $7500 bond. (Ind., Exh.C).

On August 18, 1998 Immigration Judge ("IJ") Anna Ho found petitioner deportable based upon the aggravated felony, INA &241 (a)(2)(A)(iii)[8 U.S.C.& 1251(a)(2)(A)(iii)], and ordered him deported to his native country of Vietman. (Id., Exh.D). Petitioner filed an Appeal to the Board of Immigration Appeals ("BIA") challenging the INS denial of his application for withholding of deportation. The BIA dismissed the appeal on March 23, 1999. (Id., Exh.D). Petitioner's deportation order became administratively final on that date. On April 19, 1999, Petitioner filed a petition for review with the Ninth Circuit Court of Appeals, No. 99-70455. (Id., Exh.F). The Petition

was dismissed by the Ninth Circuit Court on February 3, 2000,for lack of jurisdiction. (Id., Exh.G).

On July 26, 2000, the INS order to report for deportation (Dkt.7 at 13). Petitioner, represented by counsel, filed the Petition for Writ of Habeas Corpus on December 7, 2000. On January 16, 2001, this Court stayed his deportation pendente lite. (Dkt. #6). At this time, petitioner is not in INS custody.

III. Discussion

Respondent's Motion to Dismiss for Lack of Jurisdiction should be denied.

Respondent raised the issue of this Court's jurisdiction due the petitioner's status as an aggravated felon to a final order of deportation. (Dkt # 9 at 3). This Court, however, has jurisdiction to hear this matter because AEDPA and IIRIRA did not repeal the statutory habeas corpus remedy available via 28 U.S.C. §2241. See INS v. St. Cyr, 121 S. Ct. 2271, 2287 (2001). Accordingly, Respondent's Motion to dismiss for lack of jurisdiction should be denied.

A. The Appropriated statutory framework.

The transitional rules of IIRIRA apply to this case because deportation procedures were initiated on September 27, 1996, before IIRIRA's April 1, 1997 effective date and the BIA's March 23, 1999 final decision was entered after October 30, 1996. See Kalaw v. INS, 133 F. 3d 1147, 1150(9th Cir. 1997). Because Petitioner is governed by IIRIRA's transitional rules, IIRIRA's 'saving provision' applies.

IIRIRA & 309(c)(1). Under the saving provision Petitioner's challenge to his ineligibility for a waiver of deportation is governed by AEDPA & 440(d)'s amendment of INA §212(c). St. Cyr, 121 S. Ct. at 2289. This framework is crucial to the Court's consideration of the issues presented in the petition.

B. Respondent's Motion to dismiss the unlawful denial of withholding claim should be granted.

Review of the BIA's discretionary denial of applications for withholding of deportation raises the issue of this Court jurisdiction. The Ninth Circuit has held that under IIRIRA's transitional rules, this Court lacks jurisdiction to review the BIA's discretionary denial of Petitioner's application for withholding of deportation. Palmas- Rojas V. INS, 244 F. 3d 1191, 1192(9th Circuit 2001). (noting that transitional rules preclude review of discriminatory denials of relief from deportation); see also Matsuk v. INS, 247 F.3d 999, 1002(9th Circuit 2001).

Accordingly, Respondent's motion to dismiss this claim should be granted.

C. Respondent's motion to dismiss Petitioner's claim of unlawful denial of INA §212© relief should be granted in part and denied part.

1. Respondent's Motion to Dismiss Petitioner's claim that AEDPA was retroactively applied should be granted.

Petitioner alleges that the Immigration Judge erred by retroactively applying AEDPA and pretermitting his request for INA §212(c) [8U.S.C. §1182(c)] relief. Petitioner argues that the date he was charged with delivery, March 23, 1996 nearly one month before AEDPA's April 24, 1996, effective date, is the appropriate date to determinate his eligibility for a §212(c) waiver. But under Ninth Circuit law, eligibility for a 212(c) waiver is determined by the date he entered his guilty plea and, thus, was convicted. See Magana-Pizano v. INS, 200F. 3d. 603(9th Circuit 1999). AEDPA was not retroactively applied to Petitioner because he pleaded guilty nearly five months after AEDPA's effective date. Accordingly, Respondent's Motion to Dismiss Petitioner's claim should be granted.

2. Respondent's Motion to dismiss Petitioner's equal protection claim should be denied.

Ordinarily, habeas review of an equal protection claim begins with the issue of exhaustion of administrative

remedies. Here, Petitioner did not exhaust his equal protection claim because he did not raise it in his appeal to the BIA. INA §106(c); 8 U.S.C.§1105a(c). However, an exception exist when administrative remedies would be futile. America –Arab Anti-Discrimination Committee v .Reno, 70 F. 3d. 1045,1058(9th Cir.1995) rev'd on other grounds 525 U.S. 471(1999). Further, a constitutional challenge to an administrative action does not required exhaustion. Matthews v. Eldridge, 424 U.S. 319, 328-330 (1975). Because AEDPA eliminated the availability of §212(c) discriminatory relief for deportable aliens convicted of aggravated felonies, any application through the administrative process for & 212© relief would have been futile. Accordingly, this equal protection claim is properly before the Court on Respondent's Motion to Dismiss.

Respondent seeks to dismiss petitioner's equal protection claim because " AEDPA by its terms applies to all person in United States, citizens and noncitizens alike". (Dkt#9 at 7). Petitioner, as a deportable alien convicted of an

aggravated felony, falls into narrow period of time in which §212(c) did distinguish between deportable and excludable aliens. In re Fuentes-Campos interpreted AEDPA §440(d) amendment of §212(c) to make deportable aliens, but not excludable aliens, who had committed aggravated felonies and other offenses ineligible for discretionary relief. See Gutierrez-Perez v. Fasano, 37 F. Supp. 2d 1166, 1167n.4 (S.D. Cal 1999) (citations omitted), citing Fuentes-Campos, Interim Decision (BIA) 3318 (May 14, 1997) (en banc). Because §212 (c) relief, as amended, distinguished between deportable excludable aliens, this distinction is properly the subject of a Fifth Amendment equal protection analysis. Accordingly, Respondent's Motion to Dismiss Petitioner's equal protection claim should be denied.

3. Respondent's Motion to Dismiss Petitioner's due process claim should be stricken as moot.

Petitioner raises separates due process and equal protection claims in his petition. Because Petitioner is challenging an action by the federal government, he can only

rely on the Fifth Amendment's protection on his right of equal protection and due process. " Is well established that all individuals in the United States –citizens and aliens alike—are protected by the Due Process Clause of the Constitution. It is equal well established that the Due Process Clause incorporates the guarantees of equal protection" Garberding v. INS, 30F 3d 1187, 1190(9th Cir. 1994)(citations omitted). Petitioner's due process and equal protection claims are in effect a single claim: that his ineligibility for INA §212(c) relief violated his right to equal protection of the law under the Due Process Clause of the Fifth Amendment. Accordingly, Respondent's Motion to Dismiss Petitioner's due process claim should be stricken as moot.

IV. Conclusion

For the reasons set above I recommend that the Respondent's Motion to Dismiss (Dkt.#9) be granted and part and denied in part as follows: Granted as to Petitioner's claims of unlawful denial withholding and retroactive

application of AEDPA; Denied as to Petitioner's equal Protection claim and Respondent's motion to Dismiss for lack of Jurisdiction; and, Stricken as Moot as to Petitioner's due process claim. The remaining claim to be addressed by the parties is Petitioner's claim that his ineligibility for INA §212(c) relief violated his right to equal protection of the law under the Due Process Clause of the Fifth Amendment. A proposed Order accompanies this Report and Recommendation.